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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1870

E. I. DU PONT DE NEMOURS AND COMPANY and CHRISTIANA SECURITIES COMPANY,
*Petitioners,*
*v.*
RICHARD J. COLLINS, JR., LEWIS C. MURTAUGH,
*Respondents.*

No. 75-1872

SECURITIES AND EXCHANGE COMMISSION,
*Petitioner,*
*v.*
RICHARD J. COLLINS, JR., et al.,
*Respondents.*

## REPLY OF PETITIONERS E. I. DU PONT DE NEMOURS AND COMPANY AND CHRISTIANA SECURITIES COMPANY

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The briefs for respondents in opposition to the grant of writs of certiorari in these cases make clear that the overriding issue is whether a majority of the Court of Appeals has intruded into a domain that the Congress

under the Investment Company Act has set aside for the Securities and Exchange Commission.

The terms of merger between private corporations are ordinarily negotiated by management or the board of directors subject to the approval of the holders of a statutorily prescribed percentage of the outstanding voting stock of both companies. However, in the case of a merger between an investment company and its affiliate, Congress has provided that in addition the Securities and Exchange Commission must find that the terms are fair and reasonable and do not involve overreaching on the part of any person concerned. The Commission, following an evidentiary hearing, has unanimously so found in this case.

Upon the petition of two Du Pont stockholders, a majority of the Court of Appeals has expressed disagreement with the judgment of the Commission. No procedural irregularities are attributed to the Commission and the standard of fairness the Commission applied was well within its discretion. However, the majority below have concluded, in substance, that if they were sitting as members of the Commission they would have found the merger terms unreasonable.[1]

In so acting they have transgressed the line between agency action and court review that has been so explicitly delineated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947). The matters on which the majority disagree with the Commission—the significance of market prices,

[1] The Court of Appeals by an equally divided vote denied petitions for rehearing and suggestions for rehearing en banc (App. E to Petition in 75-1872).



ascertainment of intrinsic investment values, and discharge of fiduciary responsibilities—are clearly within the area of the Commission's special competence and expertise. Its decision is a well-articulated appreciation of the complexities of the problems and reflects a realization of the statutory policies at issue and a responsible treatment of the uncontested facts.

No additional facts or legal principles entered into the majority's disagreement with the Commission's judgment. Motivated by an expressed concern that the "Du Pont family" in some way be required to pay for the "economic, political and social advantages" that they had enjoyed in the past, they rejected the Commission's determination of fairness (App. 87(a) to Petition in 75-1872). In so acting they disregarded the direction of the Congress that determinations of fairness under the Investment Company Act are the responsibility of the Commission subject to court review and reversal only for demonstrable error.

So clear is the majority's usurpation of the Commission's function that this Court might appropriately grant writs of certiorari and reverse summarily on the ground that the action by a majority of the court below is plainly at odds with the "inveterate and certain" rule of prior decisions of this Court. *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, No. 75-1504, decided June 14, 1976; *see also Ralston Purina Co.* v. *Louisville & Nashville R.R. Co.*, No. 75-1015, decided June 14, 1976 (summarily reversed because district court substituted its judgment for that of the Interstate Commerce Commission); and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584, decided January 19, 1976 (summarily reversed because

Court of Appeals overstepped the bounds of its reviewing authority).

Respectfully submitted,

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